No. 88-1686

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

THE COLORADO DEPARTMENT OF
SOCIAL SERVICES,

Petitioner,

v.

KIMBERLY A. OBERT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF COLORADO

RESPONDENT'S BRIEF IN OPPOSITION

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ISSUE PRESENTED FOR REVIEW

Whether the Colorado Supreme Court correctly held that 42 U.S.C. §602(a)(22) requires Petitioner to consider the merits of Respondent's claim that she was underpaid AFDC benefits between July and December 1982 without regard to any time limitation imposed by 45 C.F.R. §205.10(a)(5)(iii).

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

County Letter 84-349-A is set forth in Appendix 1 at 1a, and 9 Code Colo. Reg. 2503-1, §3.800.5 (1988) is set forth in Appendix 2 at 3a. These regulatory provisions are also involved in this case.

STATEMENT OF THE CASE

This case is a judicial review of a decision of the Colorado Department of Social Services (CDSS) in an individual case concerning benefits under the Aid to Families with Dependent Children (AFDC) program. On October 5, 1984, Respondent Kimberly A. Obert filed a request for hearing asserting three claims: (1) she received less than the amount due her for the period between July and December 1982;

(2) she was wrongfully terminated from benefits in December 1982 for failure to furnish her son's social security number; and (3) she was wrongfully denied benefits on reapplication in March 1983. (Petitioner's Appendix 23).

CDSS determined that all three claims were untimely and dismissed the request for hearing. (Pet. App. 9). Obert sought state court judicial review, and the state district court affirmed the agency decision (Pet. App. 13). The Colorado Court of Appeals affirmed the judgment of the district court. (Pet. App. 18). The Colorado Supreme Court then granted certiorari on the question of whether Obert lost the right to seek correction of her alleged underpayments under 42 U.S.C. §602(a)(22) by failing to seek review of the administrative decisions creating the underpayments within the time period prescribed by state and federal regulations.[1]

The Colorado Supreme Court affirmed the judgment of the Colorado Court of Appeals in part, reversed in part, and remanded the case to CDSS for further administrative proceedings.[2] In part, the Colorado Supreme Court held that Obert could not establish an erroneous denial or termination of benefits because she failed to request an administrative hearing within ninety days of the adverse action, as required under the administrative appeal time regulations. (Pet. App. 26). Obert's second and third claims were accordingly dismissed.

On Obert's first claim, however, the Colorado Supreme Court held that 42 U.S.C. §602(a)(22) required CDSS to hear Obert's claim on the merits without regard to any

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1. Administrative appeal of an adverse agency action must be made within ninety days pursuant to 45 C.F.R. §205.10(a)(5)(iii) and 9 Code Colo. Reg. 2503-1, §3.850.11 (1981).

2. A new hearing before the CDSS is pending.

administrative appeal time regulations. (Pet. App. 32). While this case was pending, CDSS established administrative procedures for correction of underpayments, in accordance with 42 U.S.C. §602(a)(22). (Id.). The court, therefore, remanded Obert's claim to CDSS for a new hearing consistent with those administrative procedures and federal law.[3]

REASONS WHY THE PETITION SHOULD BE DENIED

I. There is no important question of federal law raised by this petition.

Petitioner asserts only two arguments why this petition should be granted. It argues that the opinion below effectively nullifies 45 C.F.R. §205.10(a)(5)(iii). (Pet. 8). CDSS also argues that no federal court has issued a dispositive decision on this issue. (Pet. 9). Neither argument presents an important question of federal law.

The Colorado Supreme Court did not invalidate 45 C.F.R. §205.10(a)(5)(iii). Rather, the court interpreted this regulation in light of the subsequent enactment of the underpayment/overpayment statute, 42 U.S.C. §602(a)(22). The court held that 45 C.F.R. §205.10(a)(5)(iii) barred any attempt to claim an underpayment of benefits in an untimely appeal of a formal denial or termination of benefits. However, in the case of an erroneous reduction in the amount

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[3]. Following the filing of petitions for rehearing by both parties, the court modified its opinion and invalidated language in the administrative procedures which placed a time limitation on the administrative correction of underpayments in cases where CDSS did not agree there was an underpayment and the recipient requested a hearing. The modified opinion is at Petitioner's Appendix D. The administrative procedures are found at Respondent's Appendix 1 and 2. They are County Letter 84-349-A and 9 Code Colo. Reg. 2503-1, §3.800.5 (1988) respectively.

of benefits, the court correctly held that Congress intended all errors to be corrected without limitation as to time. Thus, the court harmonized 45 C.F.R. §205.10(a)(5)(iii) with 42 U.S.C. §602(a)(22). This judicial construction does not raise a substantial federal question.

Assuming arguendo that there is a conflict between the decision of the Colorado Supreme Court and the federal regulation, petitioner has not demonstrated that 42 U.S.C. §602(a)(22) has been violated on the issue it requests this Court to review. The overpayment/underpayment statute requires the states to specify statewide policies for the prompt correction of any underpayments. The plain meaning of the statute is clear.

> 'All' means every. 'Any' means without restriction or limitation. The plain meaning of the statute could not be broader. Congress intended all underpayments to be corrected.

Edwards v. McMahon, 834 F.2d 796, 799 (9th Cir. 1987).

The Colorado Supreme Court correctly found that CDSS did adopt a statewide policy for the correction of underpayments in County Letter 84-349-A, pursuant to 42 U.S.C. §602(a)(22), but it properly decided the policy was too narrowly drawn and inconsistent with state law. (Pet. App. 32). (See, discussion, infra, at 6.) That interpretation is reasonable and consistent with federal law. Petitioner has not demonstrated that the Colorado Supreme Court's interpretation of CDSS procedures for the correction of underpayments is unacceptable to the Secretary of Health and Human Services or violates any provision of the Social Security Act.

No federal or state court has placed any time limitation on the states' obligations to correct underpayments. See Tambe v. Bowen, 839 F.2d 108 (2d Cir. 1988) (former

recipients of AFDC benefits may seek correction of underpayments at any time); Cudal v. Sunn, 742 P.2d 352 (Hawaii 1987) (overpayments and underpayments treated alike; neither have a time limit for recovery or adjustment); Ehrenstorfer v. Division of Public Welfare; 483 A.2d 212 (N.J. Super. Ct. App. Div. 1984) (Department must correct erroneous payment based on change in legal interpretation retroactive to date incorrect action was taken); Burton v. Department of Health, etc., 309 N.W. 2d 388 (Wis. Ct. App. 1981) (corrective payments required retroactive to date of incorrect action where error established at hearing).

Although the CDSS bemoans that it will never be able to close AFDC files, it presents no data to demonstrate how it will be harmed by the Colorado Supreme Court's interpretation of the overpayment/underpayment statute. Surely any such harm is overstated since Congress has found that 90% of all cases are correctly decided.[4] Moreover, in many other cases an administrative hearing decision would have a res judicata effect on any subsequent effort to correct an underpayment.[5] Still others would be barred by the Colorado Supreme Court's ruling strictly applying appeal time limitations in denial/termination cases. Of those remaining recipients with underpayments, it does not appear to be an odious requirement for CDSS to correct them. In fact, CDSS has admitted it is

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4. The legislative history to 42 U.S.C. §602(a)(22) shows that Congress wished to reduce the high error rate of 10% in AFDC cases. S. Rep. No. 139, 97th Cong. 1st Sess., Vol. III, 519, reprinted in 1981, U.S. Code Cong. and Ad. News, 396, 786. Since most errors are overpayments, the statute was intended to actually save money. However, to be fair Congress thought it wise to treat overpayments and underpayments alike. Id.

5. The principle of res judicata applies to administrative hearings that have the procedural characteristics of a judicial action. U.S. v. Utah Construction and Mining Company, 384 U.S. 394, 422 (1986); Restatement (Second) of Judgments, §83, Comment (b)(1982).

under an obligation to correct an underpayment when it admits an error has been made (Respondent's Appendix 1). Given the clear legal requirements of the federal statute and the factual context in which they were raised, petitioner's concerns regarding the perpetuity of appeals are not a persuasive argument.

Since petitioner has not demonstrated that the decision of the Colorado Supreme Court is contrary to any federal statute or court ruling and no important issue of federal law is present, the petition should be denied.

II. Independent adequate state law grounds support the judgment of the Colorado Supreme Court.

Obert's first claim for underpayment of benefits would have been administratively corrected by CDSS if it had agreed that an error had been made. Petitioner's policy states, "The rules require prompt correction of an underpayment regardless of when the discovery of the error occurs." (Pet. App. 26, n. 7).

However, CDSS attempted in that same policy to limit correction of underpayments in disputed cases to an unreviewable decision made by its county agents. It opposed remand of Obert's case to a state administrative law judge (ALJ) for this very reason. "In order to eliminate any confusion, [CDSS] respectfully requests that the opinion be amended to require the hearing officer to return the case to the county department to determine if there was an underpayment of benefits for the July through December 1982 period and for correction, if necessary, in accordance with County Letter 84-349-A and 9 Code Colo. Reg. 2503-1, §3.800.5 (1988)." (CDSS Petition for Rehearing, filed January 3,

1989.)

The Colorado high court declined to follow this suggestion and remanded the case to a hearing officer to make the final determination. "Consistent with our holding, any provision of County Letter 84-349-A that deprives the state hearing officer of jurisdiction to rehear Obert's claim for an alleged underpayment of benefits, is void and without legal effect." (Pet. App. 32-33). The effect of this holding was merely to conform County Letter 84-349-A to state law. Under state law, a state ALJ presides over all administrative appeals. C.R.S. §26-2-127(1)(a)(II) (1988). The ALJ makes the final agency decision for CDSS. C.R.S. §26-1-106 (1988). Any decision of a county department is not binding. C.R.S. §26-2-127(1)(c)(1982). All decisions of the state department, including final agency decisions made by the ALJ, are binding on the county departments. C.R.S. §26-2-127(2) (1982).

Thus, the only practical significance to this case is that the Colorado Supreme Court required the CDSS to make a decision on Obert's alleged underpayment at the ALJ level rather than at the lower level of the county department. This procedure is required by state law and is not inconsistent with any federal statute or regulation. In fact, federal law requires a single state agency to administer the AFDC program in each state. 42 U.S.C. §603(a)(3). The Colorado Supreme Court's opinion merely ensures uniform decision making at the state level rather than the possibility of inconsistent decision making before various county departments. The attempt by CDSS to grant its county agencies unreviewable decision making authority in underpayment cases was properly rejected by the Colorado Supreme Court on adequate independent state law grounds.

III. Only factual findings are involved in this case; the issue is not important enough to warrant review.

Petitioner maintains that the Colorado Supreme Court drew an improper distinction between termination and denial cases, on the one hand, and "underpayment" cases on the other. (Pet. 6). Such a distinction, however, is justified by the facts of Obert's case.

The facts as stated by the Colorado Supreme Court demonstrate that Obert received clear notices informing her of her appeal rights, both when her benefits were terminated in December 1982, and again when she was denied benefits on reapplication in March 1983. (Pet. App. 21-23). The adequacy of notice was not before the Court. (Pet. App. 23, n. 5.)

The record did not show, however, that CDSS ever sent Obert a notice advising her that her grant would be reduced by 74% due to its belief that Obert's father was providing her with free room and board. (Pet. App. 21, n. 2). Absent evidence of such a notice, the court was correct in distinguishing between Obert's first claim for underpayment and her second and third claims for denial and termination. Adequate notice and an opportunity for hearing are statutorily and constitutionally required in welfare benefits cases before AFDC benefits can be taken away. Goldberg v. Kelly, 397 U.S. 254 (1970); 45 C.F.R. §205.10(a)(4)(i).

Since the record demonstrates an adequate factual basis for the Colorado Supreme Court's judgment, further review by this Court is unwarranted. This case does not significantly affect the administration of the AFDC program in Colorado.

The petition does not raise a significant federal issue, and most importantly, the issues were carefully and fully addressed by the Colorado Supreme Court. There is no justifiable reason to disturb its judgment.

CONCLUSION

For these reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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May 1989

APPENDIX 1

COLORADO DEPARTMENT OF SOCIAL SERVICES
1575 SHERMAN STREET, DENVER, COLORADO 80203
COUNTY LETTER FAME 84-9

NUMBER: 84-349-A

DIVISION OR OFFICE: Income and Support Services

December 31, 1984

SUBJECT

Correction of Financial Assistance Underpayments

Bureau Chief

/s/ K. Muroya

Assoc. Dir. Program Admin.

/s/ George E. Kawamura

EXPIRATION DATE: Until Superceded

Purpose

The purpose of this county letter is to clarify the rule regarding prompt corrections of financial assistance underpayments; and to provide a procedure for a correct application of the rules.

Background

It has been brought to the attention of the State Department of Social Services that some county departments may be correcting an underpayment only if the underpayment is discovered within the 90 day or 12 month reimbursement time frames. Federal regulations allow reimbursement for correction of underpayments regardless of when the underpayment occurred for both recipients or for persons who would be recipients had the underpayment not occurred. State regulations are being revised to clarify the policy for issuing retroactive payments.

Policy

Current policy as outlined in Sections 3.800.5 through 3.800.54 requires prompt action to correct an underpayment error. Section 3.800.53 specifies time frames for State reimbursement of retroactive payments and states there is no time limit for a retroactive payment if the payment is authorized as a result of an evidentiary hearing or appeal.

The rules require prompt correction of an underpayment regardless of when the discovery of the error occurs. The State Department of Social Services assigns an appeal number to authorize reimbursement of retroactive payments which exceed the 90 day or 12 month limitations.

Procedure

When the possibility of an underpayment is discovered or brought to the attention of the county department, the eligibility technician must:

a. record the date of discovery and preliminary information known;
b. investigate and verify the facts;
c. determine eligibility for the retroactive payment;
d. if an underpayment occurred, submit Form 5475, Authorization for Retroactive Payment.

If an underpayment occurred and any or all of the retroactive payment exceeds the reimbursement time limits, and prior to submitting Form 5475, the county department must:

a. submit a letter to the Income and Support Services Division, FAME Section, Room 510, requesting assignment of an appeal number. The letter must contain the following information:
   1) identification of the subject "Request for Appeal Number for Retroactive Payment Authorization;"
   2) client's name, household number and category code:
   3) a listing of the amount of payment to be authorized for each month as it will appear on Form 5475;
   4) summary of the reason for the delay or error.

b. Enter the assigned appeal number on Form 5475 and submit the authorization for payment.

Retroactive payments which cannot be processed through the computer system must be processed manually.

When the county determines that an underpayment has not occurred, the eligibility technician records the facts and basis for the conclusion in the case record. Written notification of the determination is provided to the recipients, former recipient or the representative.

If the time limit for a hearing has not expired [sic] up to (90 days from the mailing date of the prior notice for the payment in question), the client may request a hearing so that a decision regarding the alleged underpayment may be made.

If you have any questions, please contact Dixie Anderson, Jean Bress or Tom Allen at 866-2537.

APPENDIX 2

3.800.5 CORRECTION OF UNDERPAYMENTS

Rev. eff. 10/1/85 .51 The county department must take prompt action to correct underpayments to current recipients and those who would be current recipients if the error causing the underpayment had not occurred. Underpayment means a financial assistance payment(s) received by or for an assistance unit which is less than the amount for which the assistance unit was eligible, or failure to issue a financial assistance payment to an eligible assistance unit if such payment should have been issued. When the possibility of an underpayment is discovered or brought to the attention of the county department, the income maintenance staff must:

a. record the date of the discovery;
b. investigate and verify the facts;
c. determine whether an underpayment has occurred.

When it is determined that an underpayment has occurred, the county department must take action to correct the payment. The two principal means of correction are:

a. issue an additional warrant so that the payment and the authorization are in agreement;
b. issue a retroactive payment warrant when the authorization is incorrect.

Added eff. 10/1/85 When it is determined that an underpayment has not occurred the county department income maintenance staff must:

a. record the facts and basis for the conclusion in the case record;
b. notify the assistance unit in writing of the determination including the facts and basis for the conclusion;
c. send a copy of the notification letter to the State Department, income maintenance section.

When it is determined that the assistance unit is not currently eligible for assistance or would not be currently eligible for assistance if the error causing the underpayment had not occurred, the county must:

notify the assistance unit in writing that the underpayment cannot be corrected and send a copy of notification letter to the State Department, income maintenance section.

This Revision III-85-8	Last Revision: III-79-6	
Adopted: 8/2/85	Adopted: 9/7/79	Revision
Effective Date 10/1/85	Effective Date: 11/1/79	Number 1